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# Federalism and the Federal Criminal Law

CRAIG M. BRADLEY\*

## INTRODUCTION

In 1995 in *United States v. Lopez*,<sup>1</sup> and again in 2000 in *United States v. Morrison*,<sup>2</sup> the Supreme Court struck down a federal statute as exceeding Congress's power under the Commerce Clause. In *Jones v. United States*,<sup>3</sup> the Court construed a third statute narrowly in order to avoid "grave and doubtful constitutional questions."<sup>4</sup> The statutes at issue in *Lopez* (possession of a gun within one thousand feet of a school)<sup>5</sup> and *Jones* (arson)<sup>6</sup> were criminal statutes. Although *Morrison* arose from a civil suit under the Violence Against Women Act,<sup>7</sup> the suit was based upon a rape and the opinion focused on Congress's power "to regulate . . . crime."<sup>8</sup>

The combined effect of these three cases suggested a major rethinking of the scope of federal criminal law and the reversal of substantial numbers of convictions. At least that is what the commentators believed. Shortly after *Morrison* was decided, Professor Erwin Chemerinsky opined that "[*Morrison*] likely will lead to constitutional challenges to an array of federal laws ranging from environmental to criminal to civil rights statutes."<sup>9</sup> Likewise, Professor John Baker averred that "[*Morrison*] casts constitutional doubt on much of federal criminal law . . . ."<sup>10</sup>

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1. 514 U.S. 549.

2. 529 U.S. 598.

3. 529 U.S. 848 (2000).

4. *Id.* at 857 (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

5. Gun-Free School Zones Act, 18 U.S.C. § 922(q) (2000).

6. 18 U.S.C. § 844(i).

7. 42 U.S.C. § 13981(c) (2000).

8. *United States v. Morrison*, 529 U.S. 598, 615 (2000).

9. Erwin Chemerinsky, *Shrinking Federal Powers*, TRIAL, Jan. 2001, at 82.

10. John S. Baker, Jr., *United States v. Morrison and Other Arguments Against Federal "Hate Crimes" Legislation*, 80 B.U. L. REV. 1191, 1193 (2000).

Finally, Professors Louis Virelli and David Leibowitz declared that "*Morrison* erased nearly all doubts that the Court intends to reduce federal commerce power to a fraction of what it had become in the previous sixty years."<sup>11</sup>

While my initial reaction to these cases was less dramatic, and I certainly did not feel that they "erased nearly all doubts" about anything, I nevertheless agreed with these commentators' basic message. It appeared that these decisions would likely have a significant effect on the scope of federal criminal law. However, I also noted that, on their face, they did *not* have a very profound effect. The statutes which the Court struck down or narrowed were not statutes that I, as a former federal prosecutor, felt were in any sense central to the federal law enforcement effort. Neither the Gun-Free School Zones Act nor the Violence Against Women Act are implicated in the most significant federal law enforcement activities: prosecuting organized crime, corrupt public officials, far-reaching fraud schemes, narcotics violations, terrorism, etc. Also, while the arson statute certainly could sometimes be employed against organized crime or terrorists, the Court's continued acceptance of its use in cases involving commercial property<sup>12</sup> meant that the *Jones* case would have only a limited direct impact.

The key question was, and remains, what impact these cases will have on prosecutions under other statutes that have been used successfully by the federal government to prosecute its core concerns. The most significant are the statutes that I think of as "The Four Horsemen of the Apocalypse" of federal criminal law: the Hobbs Act,<sup>13</sup> the Travel Act,<sup>14</sup> mail fraud,<sup>15</sup> and RICO.<sup>16</sup> Will *Lopez* and its progeny significantly interfere with the federal government's ability to prosecute under these statutes or to achieve its major goals under other important laws? While the Travel Act and the mail fraud statute are not placed in doubt by *Lopez*,

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11. Louis J. Virelli III & David S. Leibowitz, *Federalism Whether They Want It or Not: The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 926 (2001). Accord, Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 605 (2001) ("[T]he potential impact of *Lopez* and *Morrison* is far-reaching and disturbing."). See also Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 136 (2000) ("On a deeper level of law and politics, and against an historical backdrop of the use of federalism to deny racial equality and enforce white supremacy, *Morrison* can be seen to employ ostensibly gender-neutral tools to achieve a substantive victory for the social institution of male dominance.").

12. See *Jones v. United States*, 529 U.S. 848, 853 (2000).

13. 18 U.S.C. § 1951 (2000).

14. *Id.* § 1952.

15. *Id.* § 1341.

16. *Id.* §§ 1961-1968.

RICO and the Hobbs Act, with their "affecting interstate commerce" language, are in doubt.<sup>17</sup> In particular, the long held view of the courts of appeals that the effect on commerce of a Hobbs Act violation need only be "*de minimis*"<sup>18</sup> would appear to be at risk. Likewise, *Lopez* could perhaps impose significant limits on narcotics and weapons prosecutions.

Surprisingly, the nearly unanimous answer from the federal courts to date is: "No impact!" Very few cases have been reversed based on *Lopez* or *Morrison*, though there is a conflict in the circuits concerning the child pornography statute<sup>19</sup> and an equally divided en banc Fifth Circuit concerning the Hobbs Act's continued viability.<sup>20</sup>

This Article considers whether the lower courts have been correct in their general refusal to extend *Lopez* and its progeny to other cases. I conclude that, as to certain statutes, the lower courts have ignored the Supreme Court's strong message and that a number of these statutes are no longer valid. I thus reject the view of those (admittedly pre-*Morrison*) commentators who argued that *Lopez* should have little impact.<sup>21</sup> In particular, I argue that, contrary to the near unanimous views of the courts of appeals, *Lopez/Morrison/Jones* impose significant limitations on the government's ability to criminalize certain activity under the Commerce Clause.<sup>22</sup>

But while *Lopez* and its progeny impose meaningful limitations on federal criminal jurisdiction, these limitations do not strike at the heart of the federal government's core concerns. A consideration of other Supreme Court cases shows that the Court's majority is not intent on exalting some ideal of what federal power should be over the practical concerns of effective federal law enforcement. Rather, taking the Supreme Court's federal criminal law cases as a whole, it appears that the Court's goal is to rein in federal jurisdiction in cases where the Court's

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17. See *infra* Part II.

18. See *infra* Part II.A.

19. See *infra* Part II.C.

20. See *infra* Part II.A.

21. See, e.g., Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 660 (1996) (predicting that *Lopez* will not be significant because "in this century many aspects of our culture have favored centralization"); Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 692 (1996) (arguing that "*Lopez* will have very little practical effect" because Congress can still regulate any activity that is "a little more like commerce than the acts depicted by the government in that case"). Although I disagree with her about certain specifics, Professor Kathleen F. Brickey was closer to the mark in 1996 in citing the Violence Against Women Act as an extreme assertion of federal power that would put more pressure on the federal courts, and stating that *Lopez* "is a reminder that, contrary to contemporary thought, congressional power under the Commerce Clause is not unlimited . . ." Kathleen F. Brickey, *Crime Control and the Commerce Clause*, 46 CASE W. RES. L. REV. 801, 842-43 (1996).

22. See *infra* Part II.H.

majority deems it unnecessary to the principal purposes and goals of federal law enforcement while not disturbing the government's ability to vindicate its key concerns.<sup>23</sup>

## I. THE SUPREME COURT CASES

### A. *UNITED STATES V. LOPEZ*

In *Lopez*, the defendant was a high school student who was caught in school with a concealed handgun. The Court reversed his conviction under the Gun-Free School Zones Act of 1990.<sup>24</sup> This statute was unusual in that, as the Court observed, it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."<sup>25</sup> Nor was the statute based on any congressional finding of any effect on interstate commerce by gun possession near schools.<sup>26</sup> Rather, the government argued that "§ 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce."<sup>27</sup> This was because possession of guns leads to violent crime, and violent crime increases insurance costs and decreases interstate travel.<sup>28</sup> Also, possession of guns in schools "threaten[s] the learning environment" which leads to a "less productive citizenry" which "would have an adverse effect on the Nation's economic well-being."<sup>29</sup>

The Court, summarizing its past Commerce Clause cases, held that permissible federal regulation fell into three categories:

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23. There is also much to Professor Jed Rubenfeld's view that the federalism debate is a "mirage." Richard Brust, *Reviewing Rehnquist*, A.B.A. J., May 2003, at 47. In his view, "[t]he court's real agenda . . . is to reverse the steady march toward antidiscrimination law . . ." *Id.* Rubenfeld points to *Boy Scouts v. Dale*, 530 U.S. 640 (2000) where the Court, in an anti-federalism decision, struck down a New Jersey law prohibiting discrimination against gays by the Boy Scouts. But then, last Term, in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the Court again struck down a state law, this time in favor of gay rights. And in *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003), it allowed employees to recover money damages in federal court for a state's failure to comply with the federal Family and Medical Leave Act. Discerning a consistent direction is unfortunately difficult. Professor Larry O. Kramer's observation is that "the Rehnquist court's legacy is less about state sovereignty than it is about judicial sovereignty, a bid for supremacy over the other two branches, especially Congress." Brust, *supra*, at 47. This view has the most evidence to support it, though I doubt that most members of the Court are explicitly thinking in terms of a "bid for supremacy" as an overarching goal of the Court. Rather, they are perhaps feeling less deference to what the Court considers erroneous decisions of the other branches than in the past.

24. 18 U.S.C. § 922(q)(2)(A) made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone."

25. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

26. *Id.* at 562.

27. *Id.* at 563.

28. *Id.* at 563-64.

29. *Id.* at 564.

First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.<sup>30</sup>

Only the third category was potentially applicable in *Lopez*. As to this, the Court dismissed the above arguments by the government as to why possession of a gun in a school zone "substantially affected" commerce:

The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . . Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.<sup>31</sup>

The Court concluded that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."<sup>32</sup> The Court distinguished the New Deal case of *Wickard v. Filburn*,<sup>33</sup> in which the Court upheld penalties against a farmer who violated wheat quotas by growing wheat for his own private consumption on the ground that, though his own effect on commerce was slight, wheat growing was nevertheless a commercial activity which was subject to congressional regulation since the aggregate effect of many wheat growers on interstate commerce was substantial.<sup>34</sup> Gun possession, by contrast, was not a "commercial activity" and could not be aggregated to try to show a substantial impact on commerce.<sup>35</sup>

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30. *Id.* at 558–59 (citations omitted).

31. *Id.* at 564 (citation omitted).

32. *Id.* at 567.

33. 317 U.S. 111 (1942).

34. "[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

35. "Congress has authority under the Commerce Clause to regulate numerous commercial activities . . . [but t]hat authority, though broad, does not include the authority to regulate each and every aspect of local schools." *Lopez*, 514 U.S. at 565–66. The Court uses the terms "economic" and "commercial" interchangeably, though, as Professor Ides has pointed out, they can have rather differ-

Under the narrowest reading of *Lopez*, the defect in the statute, as the Court recognized at the very beginning of its opinion,<sup>36</sup> is that neither the statute, nor congressional findings, make any reference to interstate commerce. Under this reading, adopted by many courts of appeals,<sup>37</sup> *Lopez* could be satisfied if Congress added some reference to interstate commerce to the statute or at least made findings as to the prohibited activity's effect on commerce, as it did in the loan-sharking statute approved in *United States v. Perez*.<sup>38</sup>

This narrow reading, however, is not consistent with the thrust of the Court's reasoning. *Lopez* refers on several occasions to a "substantial effect" on interstate commerce.<sup>39</sup> Thus *Lopez*, and even more clearly *Morrison*, requires not just lip service in the statute, but rather an independent finding by the courts that the activity in question in fact substantially affects interstate commerce, regardless of the statutory language or congressional findings.<sup>40</sup>

It is also apparently not enough that, at some uncertain time in the past, a gun or other instrumentality of the crime may have moved in interstate commerce. Since almost everything, or some of its components, has moved in interstate commerce at some point, mere past movement in interstate commerce, *unconnected to the instant crime*, would not seem to satisfy the "non-infinity" principle that *Lopez* was announcing: "[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."<sup>41</sup>

Another issue raised, but not answered by *Lopez*, is whether the connection to commerce depends on the nature of the crime or the victim. Is arson of a store sufficient to fall within federal jurisdiction because the store was engaged in commerce, some of which was inevitably interstate? Or must the crime itself, as *Lopez* seemed to suggest, be "commercial." And what of other crimes that might seem more clearly

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ent meanings. Allen Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 574-80 (2001). See also *infra* text accompanying note 65.

36. *Lopez*, 514 U.S. at 551.

37. See, e.g., cases concerning the firearms statutes cited *infra* note 168.

38. 402 U.S. 146 (1971). As I noted long ago, "Congress' conclusion that loan-sharking affects interstate commerce is highly questionable in many cases." Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 252-53 (1984). For an insightful discussion into possible readings of *Lopez*, see Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, Or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (2000).

39. See *Lopez*, 514 U.S. at 556.

40. *Id.* at 563 ("[C]ongressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . .").

41. *Id.* at 564.

"economic" than gun possession, but would not be considered "commercial," such as robbery, extortion and theft? As I will discuss, *Jones* suggests answers to these questions.

It is clear that *Lopez* itself in no sense struck a "death blow" to federal criminal law enforcement. It involved a statute that was marginal to the federal law enforcement effort, and the Court declined to adopt the view of Justice Thomas's concurring opinion that federal jurisdiction should be limited only to the first two categories set forth in the majority opinion and should not apply to activity that substantially affects commerce.<sup>42</sup> Recognizing that the substantial effects test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life, he urged that it be "reconsider[ed] . . . with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting [the Court's] more recent Commerce Clause jurisprudence."<sup>43</sup> He did not explain what this test might be.

No other Justice joined in this dubious suggestion and two other members of the five-Justice majority, Kennedy and O'Connor, joined in a concurrence that made it clear that they were not signing on to a major retrenchment of federal jurisdiction but only to a "necessary though limited holding."<sup>44</sup> Kennedy further emphasized the importance of *stare decisis* in preserving the "stability of our Commerce Clause jurisprudence . . . ."<sup>45</sup> But Justice Thomas was right! As long as the "substantial effects" test remains on the books, federal criminal jurisdiction, even if somewhat constrained, will continue to be broad. Unlike Justice Thomas, I support this.

#### B. *UNITED STATES V. MORRISON*

*Morrison* answered some of the questions raised by *Lopez* while inevitably raising at least as many new questions as it answered.<sup>46</sup> This much can be said of *Morrison* with some certainty: It, like *Lopez*, did not of its own force, contrary to the commentators quoted at the beginning of this Article, command a major retrenchment of federal criminal law. While it certainly paved the way to further significant limitations on federal power, its actual holding did not greatly reduce that power. Indeed,

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42. *Id.* at 584 (Thomas, J., concurring).

43. *Id.* at 584–85 (Thomas, J., concurring).

44. *Id.* at 568 (Kennedy, J., concurring).

45. *Id.* at 574 (Kennedy, J., concurring).

46. See Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 2 (1986) (arguing that it is in the nature of Supreme Court decisions to raise more questions than they answer).



when read in tandem with *Jones*,<sup>47</sup> its immediate impact would seem to be rather narrow but still meaningful.

The *Morrison* case began with the rape of a female student (Brzonkala) at Virginia Polytechnic Institute (VPI) by two fellow students (Morrison and Crawford). Dissatisfied with the university's failure to punish her assailants, Brzonkala brought suit in federal district court under the Violence Against Women Act. After Morrison moved to dismiss on the ground that the statute was unconstitutional, the United States intervened to defend the statute.

The statute provides that a "person . . . who commits a crime of violence motivated by gender" is subject to suit under the statute.<sup>48</sup> Like the statute in *Lopez*, it contains no reference to interstate commerce. Unlike the *Lopez* statute, however, it was based on extensive congressional findings as to how violence against women affects interstate commerce.<sup>49</sup> In this respect, it resembles the statutes that the Court upheld in *Perez*<sup>50</sup> and *Heart of Atlanta Motel, Inc. v. United States*.<sup>51</sup>

The Court, in striking down the statute as exceeding Congress's powers under either the Commerce Clause or Section 5 of the Fourteenth Amendment, held that these findings were insufficient. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."<sup>52</sup> Thus the narrowest reading of *Lopez*, that it simply required a finding by Congress, was put to rest.

The Court criticized the findings because the effect of violence against women on interstate commerce was, like gun possession in a school zone, too attenuated:

[T]he concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. . . . If accepted, petitioner's reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence . . . .

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of

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47. See discussion *infra* Part II.C.

48. 42 U.S.C. § 13981(c) (2000).

49. *United States v. Morrison*, 529 U.S. 598, 614 (2000).

50. 402 U.S. 146; see *supra* note 38 and accompanying text.

51. 379 U.S. 241 (1964).

52. *Morrison*, 529 U.S. at 614 (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).

marriage, divorce, and childrearing on the national economy is undoubtedly significant.<sup>53</sup>

Thus, the Court reiterated the non-infinity principle as a *constitutional* limit on Congress's authority, not just a principle of statutory interpretation.<sup>54</sup> What, then, is the scope of allowable federal action?

The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.<sup>55</sup>

I doubt that a consistent "distinction between what is truly national and truly local" can be drawn and believe that this is no more likely to produce a coherent doctrine than then-Associate Justice Rehnquist's attempt to distinguish "traditional [state] governmental functions" from non-traditional ones in *National League of Cities v. Usery*.<sup>56</sup> Nevertheless, this statement provides an important insight into the Court's priorities: The Court will look more benignly upon congressional attempts to regulate matters that the states cannot, will not, or are ineffective in, regulating. The majority did not consider violence against women to be such a matter.

A firm requirement that federal crimes based on the Commerce Clause must be limited to those "directed at the instrumentalities, channels or goods involved in interstate commerce," as the Court stated in *Morrison*, would be a dramatic limitation on federal power and would seem to wipe out the third *Lopez* category of "substantially affecting commerce" as a basis of federal authority. But *Morrison* goes on to make it clear that acts that "substantially affect commerce" are still subject to federal jurisdiction.<sup>57</sup> A "substantial effect," however, can only be shown by aggregating "*economic activity*."<sup>58</sup>

In elaborating on why the Gun Free School Zones Act had been found deficient in *Lopez*, the Court provided guidance for determining when such a substantial effect may be found. As summarized by the Ninth Circuit, these include:

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53. *Id.* at 615–16 (citation omitted).

54. It therefore seems clear that the Hate Crimes Prevention Act of 1999, prohibiting violence motivated by the "race, color, national origin, religion, sexual orientation, gender or disability" of the victim and based on findings that "such violence affects interstate commerce in many ways" will not pass muster after *Morrison*. 145 CONG. REC. S9038 (daily ed. July 22, 1999).

55. *Morrison*, 529 U.S. at 617–18 (citation omitted).

56. 426 U.S. 833, 852 (1976). This effort was abandoned by the Court nine years later in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985).

57. *Morrison*, 529 U.S. at 609.

58. *Id.* at 613 (emphasis added).

1) whether the statute in question regulates commerce "or any sort of economic enterprise"; 2) whether the statute contains any "express jurisdictional element which might limit its reach to a discrete set" of cases; 3) whether the statute or its legislative history contains "express congressional findings" that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated."<sup>59</sup>

This seems to suggest that, for example, the Hobbs Act, with its reference to "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion" is guilty,<sup>60</sup> would pass muster since "the design of the statute has an evident commercial nexus," as *Morrison* required.<sup>61</sup> Likewise, statutes that forbade the sale or shipping of a gun in interstate commerce to certain people, the arson of a building used in commerce, or loansharking (a commercial activity that Congress says has an interstate effect) would all likely pass the *Morrison/Lopez* test.<sup>62</sup> Thus, while congressional findings alone are not enough, findings regarding a crime that had a more obvious impact on commerce would suffice. Likewise, a statute that actually requires the government to prove a substantial effect on commerce would be adequate. On the other hand, the mere presence of a "jurisdictional hook," i.e., some reference to interstate commerce in the statute, is just one of four criteria to be considered and is neither necessary, if the appropriate effect on commerce can otherwise be established, nor sufficient, if the effect cannot be shown.

What about a Hobbs Act prosecution for a bribe given to a judge by a lawyer so his client receives a suspended sentence in a criminal case?<sup>63</sup> A bribe is "economic," and perhaps even "commercial," in that it involves a consensual exchange of money for services in the course of the parties' business. On the other hand, the effect of this bribe on interstate commerce is attenuated at best. But if the bribe is considered a "commercial activity," *Morrison* approved "aggregating its effects" to show an effect on commerce.<sup>64</sup> This could easily be done since, if judges routinely took bribes to fix cases rather than deciding them on the merits, the chilling effect on commercial transactions would be significant. We do not yet

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59. *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003) (summarizing *Morrison*, 529 U.S. at 610-12).

60. 18 U.S.C. § 1951(a) (2000).

61. *Morrison*, 529 U.S. at 611.

62. In *Lopez*, the Court cited *Perez v. United States*, 402 U.S. 146 (1971), which upheld the loan-sharking statute, as an example of Congress's regulation of "activity that 'exerts a substantial economic effect on interstate commerce.'" 514 U.S. at 557 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

63. See *United States v. Stillo*, 57 F.3d 553, 555-56 (7th Cir. 1995).

64. *Morrison*, 529 U.S. at 613.

know, however, how much the Court is willing to extend the concept of "commercial."

This is one of a number of questions that can be raised about one of the statutes affected by *Morrison* and *Lopez*. There are many others. Indeed, Professor Allan Ides has ably demonstrated that *Morrison*'s pronouncements as to the scope of federal jurisdiction may be read as so vague as to amount to little more than "I know it when I see it."<sup>65</sup> However, I come not to bury *Morrison* but to understand it. Obviously the majority had *some* sense of what the limits of Congress's power to declare criminal laws under the Commerce Clause must be, even if it did not express them clearly. We can find some clues as to what the Court's position may be by considering further Supreme Court cases.

### C. *JONES V. UNITED STATES*

Unlike the hotly contested holdings in *Lopez* and *Morrison*, *Jones* was a brief, unanimous decision construing a federal statute narrowly. This construction, however, was to avoid "grave and doubtful constitutional questions" had the conviction been upheld.<sup>66</sup> *Jones* tells us much about the Court's direction when read in conjunction with the other two cases.

In this case, the defendant was convicted under the federal arson statute for throwing a Molotov cocktail into the home of his cousin in Indiana.<sup>67</sup> The federal arson statute provides that it is a crime to damage or destroy "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting . . . commerce."<sup>68</sup>

In contradistinction to the statutes in *Lopez* and *Morrison*, this one contains a direct reference to interstate commerce. Moreover, the government could show a much stronger connection to interstate commerce than in the earlier cases: the mortgage was held by an out-of-state lender, the home was insured by an out-of-state insurance company, and the home used natural gas from out of state. Thus, the statute required, and the government proved, effects on interstate commerce by the home's destruction. Surely, nervous federal prosecutors must have said to themselves, if the Court did not intend to gut federal criminal jurisdiction, this statute would pass muster.<sup>69</sup>

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65. Ides, *supra* note 35, at 574.

66. *Jones v. United States*, 529 U.S. 848, 857 (2000).

67. *Id.* at 850.

68. 18 U.S.C. § 844(i) (2000).

69. Indeed the Seventh Circuit, in an opinion by Judge Easterbrook, agreed with the government without dissent. *United States v. Jones*, 178 F.3d 479, 481 (7th Cir. 1999).

"Not good enough," held the Court. The statute requires that the building be "used" in interstate commerce. The Court stated that, "The key word is 'used.'"<sup>70</sup> (It is?) "The proper inquiry . . . is into the function of the building itself, and then a determination of whether that function affects interstate commerce."<sup>71</sup> The Court then concluded that "used" means "active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce."<sup>72</sup> Since it is "not the common perception that a private, owner occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage or an insurance policy"<sup>73</sup> it followed that this home did not qualify under the statute *ipso facto*. Moreover, "[w]ere [the Court] to adopt the Government's expansive interpretation of § 844(i) hardly a building in the land would fall outside the federal statute's domain."<sup>74</sup>

The discussion so far would be greeted with great enthusiasm by proponents of a limited federal role since *Jones* went a step further than *Morrison* in reversing a conviction under a statute that actually contained an "affecting commerce" element and as to which the government could make at least a colorable argument that interstate commerce was affected, albeit as a matter of statutory construction.

But, the Court explicitly reaffirmed its prior holding in *Russell v. United States* which held that § 844(i) *did* apply to the burning of a two-unit apartment building because, as a rental property, it was "being used in an activity affecting commerce . . ."<sup>75</sup> Even though the connection to interstate commerce was precisely the same in both *Russell* and *Jones* (natural gas, insurance, etc.) and even though the rental property was "used in the activity of receiving natural gas" in precisely the same way that a private home is "used" in that activity, the fact that the property burned in *Russell* was a commercial property rather than a private home was sufficient to support the conviction in *Russell*.

Thus, *Jones* apparently stands for one of two propositions: First, if the victim of the crime is a commercial entity, no particular effect on interstate commerce need be shown because victimizing a commercial entity inevitably affects interstate commerce.<sup>76</sup> Alternatively, by continuing

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70. *Jones*, 529 U.S. at 854.

71. *Id.* (citations omitted).

72. *Id.* at 855.

73. *Id.* at 856.

74. *Id.* at 857.

75. *Id.* at 853, *aff'g* *Russell v. United States*, 471 U.S. 858 (1985).

76. The *Jones* Court noted that the mere fact that the building was rented in *Russell* established that it "was . . . being used in an activity affecting commerce" without any reference to interstate commerce. *Id.* (citation omitted). *Jones* further observed that nearly every "building in the land" is

to authorize prosecutions for burning local rental property, *Jones* may have been saying that once it is determined that the victim is commercial, the effect on interstate commerce is achieved by aggregating the effect of all such intrastate burnings as in *Wickard v. Filburn*.<sup>77</sup> In any case, once the victim is commercial, the connection to interstate commerce is a foregone conclusion.

There is more to *Jones*, though. What if Congress, “to make clear [its] intent to reach the arson of private dwellings” amends the arson statute, leaving out the word “used,” and simply forbids the “destruction of any property by fire or explosive device, which destruction affects interstate or foreign commerce”? Would it now be constitutionally permissible to prosecute for arson of a private home? I think not. *Jones*, of course, avoided this question by focusing on the word “used,” but this hypothetical statute raises the “grave and doubtful” constitutional issue that *Jones* avoided.

Were such a prosecution allowed under the hypothetical statute, “hardly a building in the land would fall outside the federal statute’s domain,” as in *Jones*, because it “is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, [etc.]”<sup>78</sup> Similarly, as *Morrison* made clear, this non-infinity principle is a constitutional “limitation of congressional authority, not solely a matter of legislative grace.”<sup>79</sup> Thus *Jones* and *Morrison* combined stand for the principle that it is not enough that a statute says “affecting commerce.” Rather, as *Morrison* holds, commerce must in fact be “substantially affect[ed].”<sup>80</sup> *Jones*, by holding that a private home is not “used” in commerce also precluded a holding that the burning of a private home substantially affects commerce because private, non-commercial activity cannot be aggregated and the burning of a single home will not have a substantial effect. Thus, *Jones* provides the key that unlocks *Morrison*’s message for federal criminal law.

What if the homeowner in *Jones* had burned his own home to collect the insurance proceeds? What if a home is burned in connection with an extortionate demand for protection payments rather than because of an

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connected to interstate commerce because it “is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection,” etc. *Id.* at 857.

77. This is supported by a *Wickard*-type argument used in *Russell*: “[T]he local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.” 471 U.S. at 862.

78. *Jones*, 529 U.S. at 857. To be sure, *Jones* used this language to suggest that Congress did not intend the statute to be this broad.

79. *United States v. Morrison*, 529 U.S. 598, 616 (2000).

80. *Id.* at 609.

apparent personal grudge? *Jones* quoted Justice Kennedy's statement in *Lopez* that "neither the actors nor their conduct has a commercial character."<sup>81</sup> Thus, a possible reading of these cases is that, as long as the crime is economically motivated, unlike gun possession, rape, or (non-profit) arson, it falls within the federal ambit. However, as I argue below, I do not believe that the Court intended the *Lopez* limitation to be so narrow. That is, arson for profit, robbery, etc., though arguably "economic" in nature, are not "commercial," as *Lopez* and *Morrison* required.<sup>82</sup> We must focus on the business of either the actor or the victim. If the actor is in the "business" of committing arson, then it is fair to deem his crime "commercial" and within federal jurisdiction. Otherwise, as *Jones* and *Morrison* make clear, the focus must be on whether the victim is commercial. Crimes aimed at private individuals or private property do not ordinarily qualify for federal jurisdiction.<sup>83</sup>

A final note about *Jones*: A separate concurrence by Justice Stevens, joined by Justice Thomas, which emphasized that the Court "should narrowly interpret federal criminal laws that overlap with state authority unless congressional intent to assert its jurisdiction is plain,"<sup>84</sup> shows that concern about overly expansive federal jurisdiction is not limited to the Court's right wing. Where Justices Stevens and Thomas part company is on whether to strike down statutes where congressional intent is clear.<sup>85</sup> Given *Morrison* and *Lopez*, I think that a majority of the Court would strike down my hypothetical post-*Jones* arson statute.

#### D. OTHER SUPREME COURT CASES

In *Scheidler v. National Organization for Women, Inc. (NOW II)*<sup>86</sup> decided in 2003, the Supreme Court dealt with the meaning of the Hobbs Act in the context of a civil RICO suit brought by the National Organization of Women (N.O.W.) against Operation Rescue and other anti-

81. *Jones*, 529 U.S. at 858 (quoting *United States v. Lopez*, 514 U.S. 549, 580 (1995)).

82. "First, we observed that § 922(q) was 'a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise . . .'" *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 561). Prosecution under 18 U.S.C. § 844(d) would, however, be possible if the explosive had been "received" in interstate commerce.

83. See *infra* note 131 and accompanying text. Another issue raised by *Jones* is whether arson of a church can now be prosecuted under § 844(i). In *United States v. Rayborn*, the court, reflecting the view of other courts of appeals, held that it could, considering a church to be functioning as a "business" for the purposes of the statute. 312 F.3d 229, 233-34 (6th Cir. 2002). This seems correct.

84. *Jones*, 529 U.S. at 860 (Stevens, J., concurring).

85. See *Morrison*, 529 U.S. at 656 (Breyer, J., dissenting, joined by Stevens, J.).

86. 537 U.S. 393 (2003). This case followed *National Organization for Women, Inc. v. Scheidler (NOW I)*, 510 U.S. 249 (1994), in which a unanimous Court, one year before *Lopez*, interpreted RICO broadly, concluding that "RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering activity were motivated by an economic purpose." *NOW II*, 537 U.S. at 398-99 (quoting *NOW I*, 510 U.S. at 256-62).

abortion protestors. N.O.W. claimed that the protestors had committed a pattern of Hobbs Act violations by committing various acts of violence against clinics in an effort to drive them out of business. The issue was whether such behavior constituted "extortion" which the Hobbs Act defines as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force . . . ."<sup>87</sup> The Court, by an eight-to-one vote, held, in an opinion by Chief Justice Rehnquist, that the Hobbs Act means what it says: the defendants must actually obtain or attempt to obtain<sup>88</sup> property. It is not enough that they sought to drive the victims out of business. That is the crime of criminal coercion not extortion.<sup>89</sup>

The government as *amicus curiae*<sup>90</sup> and Justice Stevens, the sole dissenter,<sup>91</sup> were concerned that the Court's decision would prevent the government from prosecuting not only violent anti-abortion protestors but also organized criminals who attempted to drive competitors out of business in order to take over all of the business for themselves, as in *United States v. Tropiano*,<sup>92</sup> where mobsters tried to drive away competing trash haulers. But the Court responded that

the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano* . . . in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts "constituted property within the Hobbs Act definition."<sup>93</sup>

In other words, the right to do business is an intangible property right that can be the subject of extortion. But in *NOW II*, unlike the situation in *Tropiano*, the defendants' ultimate goal was not to "obtain" that property. The protestors did not want to take over the abortion clinics; they wanted to drive them out of business. Thus, as in *Jones*, although the Court construed a federal statute narrowly, and contrary to the way the Justice Department wanted it construed, it carefully avoided interfering with the government's ability to use the statute to prosecute one of its core concerns: in this case, organized crime.

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87. 18 U.S.C. § 1951(b)(2) (2000).

88. The Hobbs Act also is violated by attempts. *Id.* § 1951(a).

89. *NOW II*, 537 U.S. at 405.

90. Brief of Amicus Curiae United States at 16, *NOW II*, 537 U.S. 393 (2003) (No. 92-780).

91. *NOW II*, 537 U.S. at 412. (Stevens, J., dissenting).

92. 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

93. *NOW II*, 537 U.S. at 402 n.6 (citations omitted).



The Court had made a similar ruling in the 1987 case of *Carpenter v. United States* in construing the federal mail fraud statute.<sup>94</sup> Since this statute is based on the postal, rather than commerce, power, this case is only indirectly relevant. However, it shows both the Court's tendency to read federal statutes narrowly and its care not to interfere with the federal government's core prosecutorial interests.

In *McNally v. United States*,<sup>95</sup> decided in the Term prior to *Carpenter*, the Court had held that the word "fraud" in the mail fraud statute required the defendant to deprive the victim of property, namely "the deprivation of something of value by trick, deceit, chicane or overreaching."<sup>96</sup> Thus, depriving the citizens of Kentucky of the "intangible right to good government" by an insurance kickback scheme, which did not violate Kentucky law or deprive the state of any revenue, did not violate the mail fraud statute. Similar to *Morrison*, *McNally* was described as "one of the most devastating blows to the Justice Department in years," by one Washington attorney.<sup>97</sup> Congressman Conyers called it "a crippling blow" and introduced legislation to override it.<sup>98</sup>

In *Carpenter*, however, the Court made it clear that property included intangible property, including a business's "right to exclusive use" of confidential business information.<sup>99</sup> Thus, the government's ability to prosecute frauds whose goal was depriving victims of intangible property, such as information, business reputation, etc., could still be prosecuted despite the *McNally* "property" limitation. Even if Congress had not acted, the effect of *McNally* would have been limited to the laudable goal of forcing federal prosecutors to think more clearly about who was defrauded out of what, rather than basing prosecutions on such ephemeral theories as the intangible right to honest services, to good government or the like.<sup>100</sup>

Another case that bears on where the Court may be going in limiting the federal government's power to prosecute various crimes is *United*

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94. 484 U.S. 19, 25-28. The mail fraud statute, 18 U.S.C. § 1341 (2000), provides that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . by mail" is guilty.

95. 483 U.S. 350 (1987).

96. *Id.* at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

97. Craig M. Bradley, *Foreword: Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 574 (1988).

98. *Id.* A new statute, 18 U.S.C. § 1346 (2000), was enacted providing that it is a violation of § 1341 to "deprive another of the intangible right of honest services." See also *id.* at 618-20.

99. 484 U.S. at 26.

100. Bradley, *supra* note 97 at 593-95. Professor John C. Coffee, Jr. likewise was a strong critic of the "intangible rights" approach. See John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983).

*States v. Robertson*,<sup>101</sup> decided five days after *Lopez* in 1995. In *Robertson* the issue was whether a defendant who invested narcotics proceeds into a gold mine violated RICO.<sup>102</sup> The RICO statute provides that it is a violation to invest the proceeds of specified unlawful activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."<sup>103</sup> It was established that the defendant purchased equipment out of state, hired out-of-state employees, paid for them to travel to Alaska, and transported some of the gold out of state.<sup>104</sup> The Court held that it did not have to decide whether the "activities met . . . (or would *have* to meet), the requirement of substantially affecting interstate commerce . . . ."<sup>105</sup> Instead, the Court concluded that the defendants

assuredly brought the gold mine within § 1962(a)'s alternative criterion of "any enterprise . . . engaged in . . . interstate or foreign commerce." As we said in *American Building Maintenance*, a corporation is generally "engaged in commerce" when it is itself "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce."<sup>106</sup>

Thus, as long as the *actor* is engaged in commerce (i.e., actual commerce, not just a crime that seeks money) then the government need not prove that the crime affected commerce. Because of the non-infinity principle, it would not be enough to establish federal jurisdiction to show that a robber, for example, used a gun that had traveled in interstate commerce. But it may be enough, based on *Robertson*, to show that a criminal syndicate engaged in a series of robberies, car thefts, kidnappings, etc., as a business.

Another important case construing a federal criminal statute to give the federal government continuing ability to vindicate its key concerns is *Evans v. United States*.<sup>107</sup> *Evans* was a Hobbs Act prosecution of a county commissioner for accepting a bribe in a zoning matter.<sup>108</sup> Although the Hobbs Act does not prohibit bribery by its terms, the Court held that the statute's prohibition of "extortion under color of official right" included bribery.<sup>109</sup> A majority reached this conclusion, just three years before

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101. 514 U.S. 669 (1995) (per curiam).

102. *Id.* at 670–71.

103. 18 U.S.C. § 1962(a) (2000).

104. *Robertson*, 514 U.S. at 670–71.

105. *Id.* at 671.

106. *Id.* at 671–72 (citation omitted).

107. 504 U.S. 255 (1992).

108. *Id.* at 257–58.

109. *Id.* at 268 n.18.

*Lopez*, despite Justice Thomas's argument in dissent that "concerns of federalism require us to give a *narrow* construction to federal legislation in such sensitive areas" (i.e., "[the] conduct of state governmental officials").<sup>110</sup> Obviously, the majority agreed with the government that prosecution of local officials for bribery is an important federal concern despite the fact that the statute does not proscribe bribery by its terms and despite the federalism issues raised by Justice Thomas.

#### E. WHERE THE COURT IS GOING

The strong sense conveyed by the recent Supreme Court pronouncements in federal criminal law is that the Court is not interested in making severe cutbacks in federal criminal authority. Under many federal statutes, the connection to interstate commerce is much more direct and obvious than the statutes at issue in *Lopez* and *Morrison*. Even when it is not, however, as in the Hobbs Act prosecution for bribery of a local official in *Evans*,<sup>111</sup> the Court has been willing to accept a broad reading of federal statutes when necessary to further significant federal concerns. Also, in cases like *NOW II*<sup>112</sup> and *McNally* and *Carpenter*,<sup>113</sup> where the Court read a statute narrowly, it was careful to ensure the statute's "core" uses were not impeded.

What the Court is trying to do, at least in part, is to stem the tide of what it regards as unnecessary federal legislation which is overburdening the federal courts. As Professor Deborah Jones Merritt pointed out in 1995 after *Lopez*:

Since 1980, the annual number of federal criminal cases has expanded by more than fifty percent. Criminal cases now account for almost one-half of all federal trials, and, in some districts, criminal trials swamp civil ones.

....

... In 1990, a Federal Courts Study Committee cautioned that "the long-term health of the federal judicial system require[s] returning the federal courts to their proper, limited role in dealing with crime."<sup>114</sup>

The Supreme Court Justices each head a circuit and meet annually with the district and appellate court judges. As one of those judges reports:

At every meeting of federal judges that I attend there is the complaint that the Congress is broadening federal jurisdiction to the point where

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110. *Id.* at 291 (Thomas, J., dissenting).

111. See *supra* text accompanying note 107.

112. See *supra* text accompanying note 86.

113. See *supra* text accompanying notes 94-100.

114. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 707-08 (1995) (citations omitted).

we are unable to do our jobs. The historically unique and discrete jurisdiction of the Federal Courts is being distorted. The constant lament is that the constitutional concept of Federalism is being eviscerated by the Congress.<sup>115</sup>

This is not to say the Supreme Court's primary concern is the dissatisfaction of federal judges about being overburdened. Rather it is that the Supreme Court agrees with its fellow federal judges that Congress has a tendency to claim to solve social problems by creating new crimes, without much thought about the consequent overburdening of the federal courts. A majority of the Court no doubt considered the Gun Free School Zones Act and the Violence Against Women Act to be just such unnecessary legislation, passed by Democratic Congresses to mollify liberal interest groups—but unlikely to have any significant effect on gun possession in schools, violence against women, or commerce.

However, a significant portion of the problem lies not with Congress but with the Justice Department. Departmental guidelines state that Hobbs Act robbery provisions, for example, are “to be utilized only in instances involving organized crime, gang activity or wide-ranging schemes.”<sup>116</sup> Yet it is obviously employed much more broadly than that. Similarly, the brief for the government in *Jones* contains no discussion of why the federal government *needs* to prosecute a routine arson of a home case. Rather, its argument is basically: “We want to because we can.”

Finally, as the cases interpreting a series of federal statutes discussed below illustrate, the fault for the overburdening of the federal courts lies, not just with Congress and the executive branch, but with the courts themselves, which have largely ignored the implications of *Lopez*, *Morrison*, and *Jones* and have construed federal statutes more broadly than those cases suggest that they should.

## II. THE STATUTES

While on their faces, and in the view of the commentators, *Lopez*, *Morrison*, and *Jones* seemed to raise serious questions about the constitutionality of many federal statutes, few convictions have been reversed based on these cases. Two of the four key statutes mentioned at the beginning of this Article are not affected at all. The mail fraud statute is based on Congress's power over the mails, not the commerce power.

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115. *United States v. Cortner*, 834 F. Supp. 242, 244 (M.D. Tenn. 1993), *rev'd sub nom.* *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994). Likewise, Professor Kathleen Brickey reports that in Chief Justice Rehnquist's “year-end reports to the judiciary, he has warned that the federal courts are limited resources and that unchecked growth of federal criminal law threatens to create a crisis in the federal justice system.” Brickey, *supra* note 21, at 840.

116. U.S. ATT'YS MANUAL § 9-131.040 (Apr. 1999).

And the Travel Act, which requires "travel in or use of a facility" in interstate or foreign commerce clearly falls under one of the first two *Lopez* criteria.<sup>117</sup> By contrast, both the Hobbs Act and RICO use the "affecting interstate commerce" language which is problematic under *Lopez* and *Morrison* unless the effect is "substantial." This Part discusses these and other federal criminal statutes.

#### A. THE HOBBS ACT

The Hobbs Act provides that "whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion" is guilty.<sup>118</sup> A leading, and typical, court of appeals case on the constitutionality of the Hobbs Act after *Lopez* is *United States v. Bolton*.<sup>119</sup> The defendant, Bolton, committed a series of robberies of businesses in Wichita, Kansas.<sup>120</sup> The court noted that each of the businesses was deprived of money that would have been used to purchase supplies in interstate commerce.<sup>121</sup> The court further pointed out the well established rule that, since the Hobbs Act applies to conduct that "in any way or degree . . . affects commerce" even a *de minimis* effect on commerce is sufficient to satisfy its terms.<sup>122</sup>

The court then summarized the holding of *Lopez*:

*Lopez* did not . . . require the government to show that individual instances of a the regulated activity substantially affect commerce . . . . Rather, the Court recognized that if a statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce . . . "the *de minimis* character of individual instances arising under that statute is of no consequence."

. . . Unlike possession of a firearm in a school zone . . . robbery and extortion are activities that through repetition can substantially affect interstate commerce.<sup>123</sup>

*Bolton* is largely correct, and has been widely relied upon by other courts of appeals, in finding that robberies that deplete the assets of businesses not only satisfy the Hobbs Act's "affecting commerce" requirement but also satisfy *Lopez*.<sup>124</sup> In other words, a *de minimis* effect

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117. In fact, in *Morrison*, the Court cited another provision of the Violence Against Women Act with approval, 18 U.S.C. § 2261(a)(1), which, similarly to the Travel Act, punishes violence during or as a result of interstate travel. 529 U.S. at 613-14 n.5.

118. 18 U.S.C. § 1951 (2000).

119. 68 F.3d 396 (10th Cir. 1995).

120. *Id.* at 397.

121. *Id.* at 399.

122. *Id.* at 398.

123. *Id.* at 399 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)) (citations omitted).

124. See, e.g., *United States v. Cordero*, 1998 U.S. App. LEXIS 31039, at \*12 (4th Cir. Dec. 10, 1998); *United States v. Robinson*, 119 F.3d 1205, 1212 (5th Cir. 1997).

on commerce is still sufficient after *Lopez* as long as a commercial entity is the victim, because such robberies can be aggregated to show an effect on commerce.<sup>125</sup>

However, *Bolton* also held that robbery of a private individual was sufficient to violate the Hobbs Act,<sup>126</sup> a position taken by other courts of appeals as well.<sup>127</sup> Robbery of a private individual, though, like arson of a private home, cannot be aggregated to show a substantial effect on commerce. Consequently, unless a defendant has committed a robbery or series of robberies that are of sufficient magnitude that they have a substantial effect on commerce themselves, the Hobbs Act has not been violated.

Some courts of appeals have recognized this. In *United States v. Wang*,<sup>128</sup> for example, the defendant robbed a group of people in a private residence of \$4200, of which \$1200 belonged to a restaurant that did business in interstate commerce.<sup>129</sup> The court found that robbery of private individuals did not fall under the Hobbs Act and that “there [was] no proof that [the victims] closed the restaurant, that they were unable to order goods from out of state. There [was] no evidence of an effect upon interstate commerce.”<sup>130</sup> Indeed, as I argued above, even if the robbery of the individual could have been shown to have some effect on interstate commerce, that would not be enough to satisfy the “substantiality” requirement.

As *Wang* notes, this decision is simply one of a number of pre- and post-*Lopez* decisions that have held that robbery (or extortion) of a private individual that has only a “speculative, indirect effect on a business engaged in interstate commerce” is not enough to violate the Hobbs Act.<sup>131</sup> Otherwise, the Sixth Circuit agrees with the unanimous view of the other circuits that “the Hobbs Act’s *de minimis* standard survives *Lopez*.”<sup>132</sup>

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125. This was made clear in *Lopez*: “[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.” 514 U.S. at 558 (citations omitted).

126. *Bolton*, 68 F.3d at 400 n.3. While the property taken in *Bolton* was a credit card, the court did not base its holding on the unique attributes of a credit card *vis-à-vis* commerce.

127. *E.g.*, *United States v. Taylor*, 176 F.3d 331, 339 (6th Cir. 1999).

128. 222 F.3d 234 (6th Cir. 2000).

129. *Id.* at 240.

130. *Id.* at 237 (quoting a finding of the district court).

131. *Id.* at 238. *Accord*, *United States v. Perrotta*, 313 F.3d 33, 37 (2d Cir. 2002) (arguing that *Jones* supports this view); *United States v. Lynch*, 282 F.3d 1049, 1052–55 (9th Cir. 2001).

132. *Wang*, 222 F.3d at 239.

There is a narrower view of *Lopez*'s scope held by exactly half of the Fifth Circuit, en banc.<sup>133</sup> The en banc court's failure to overrule the panel judges' decision to sustain the defendant's conviction keeps the Fifth Circuit, just barely, in the fold with the other circuits in finding that *Lopez* did not substantially diminish the Hobbs Act. Since the Fifth Circuit dissent is the only dissenting view from the consensus in the courts of appeals, I consider it at length.

The dissenting opinion, authored by Judge Higginbotham, focuses on the "commercial activity" language of *Lopez*. In *Hickman*, the defendants had robbed a series of chain stores and restaurants in Beaumont, Texas, with total losses of about \$8000.<sup>134</sup> The dissent noted that "the Hobbs Act is not a regulation of any relevant interstate economic market (unlike the wheat market regulations in *Wickard v. Filburn*<sup>135</sup>) nor are there other rational connections among nationwide robberies that would entitle Congress to make federal crimes of them all."<sup>136</sup>

The dissent continued: Since robbery is not "economic activity,"<sup>137</sup> it follows that robberies cannot be aggregated to achieve the "substantial effect on interstate commerce" required by *Lopez*, and therefore only robberies by, for example, "an organized crime group . . . that together substantially affected commerce" would be covered by the Hobbs Act.<sup>138</sup>

If one could aggregate robberies under the Hobbs Act to satisfy the constitutional demand of a substantial effect on interstate commerce, there would be no reason one could not aggregate murders, or other felonies to sustain general federal jurisdiction over all crimes. . . . Without some judicially enforceable outer limits to the aggregation theory, "it is difficult to perceive any limitation on federal power, even in areas such as law enforcement . . . where States historically have been sovereign."<sup>139</sup>

Certainly the position taken by the *Hickman* dissent is a direction in which the Supreme Court could go and which some members of the Court would probably like to go. One could well ask why the federal government feels the need to prosecute a series of robberies in Beaumont, Texas by apparently local criminals and how the federal law enforcement effort would be damaged if they could not. There is no

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133. *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) (per curiam).

134. *Id.* at 231 (Higginbotham, J., dissenting).

135. 317 U.S. 111 (1942).

136. *Hickman*, 179 F.3d at 231 (Higginbotham, J., dissenting).

137. *Id.* at 238 (Higginbotham, J., dissenting) ("Robbery is not selling, buying, or bartering, and it does not produce anything.").

138. *Id.* at 236 (Higginbotham, J., dissenting).

139. *Id.* at 232 (Higginbotham, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 566 (1995)).

suggestion in *Hickman*, nor in the myriad other robbery cases prosecuted by the federal government, that the states are not doing, or cannot do, the job.

However, in my view, the *Hickman* dissent misreads *Lopez*, especially in light of *Morrison* and *Jones*. By focusing on the *crime's* not being commercial activity, Judge Higgenbotham has missed the point. According to *Lopez*, Congress has the power to "protect the instrumentalities of commerce" from crime, including "the destruction of aircraft" and "thefts from interstate commerce."<sup>140</sup> Thus, *any* crime can fall under federal jurisdiction if it interferes with the instrumentalities of commerce, even if the crime itself is not "commercial activity."

Most courts, however, do not consider a restaurant or store to be an "instrumentality of commerce" like an airplane or a truck, although that is not obvious.<sup>141</sup> Therefore we turn to the third *Lopez* category: "Congress's power to regulate those activities having a substantial effect on commerce."<sup>142</sup> It is already settled by *Katzenbach v. McClung* that operation of a restaurant has such an effect at least if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in interstate commerce."<sup>143</sup> A Hardees restaurant and an AutoZone store are, by virtue of being national chains, even more involved in interstate commerce than was the locally owned Ollie's Barbeque in *McClung*. In other words, even if we concede that the crime is not a commercial or economic activity, as long as that crime is *aimed* at commercial activity, *Lopez* is satisfied, just as when crime is aimed at an "instrumentality of commerce." Any doubt on this score was cleared up by *Jones's* distinction between private and rental property as a subject of arson.

Furthermore, while a gross restriction on the federal government's robbery jurisdiction would perhaps not unduly interfere with its ability to vindicate its core concerns, the reasoning of the *Hickman* dissent would apply equally to extortion, and this would cause serious problems. The Hobbs Act's extortion provision is particularly important in fighting two of the federal government's major concerns: organized crime and its handmaiden, corruption of state and local officials. The use of extortion by organized criminals in "protection rackets," as discussed in the refer-

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140. 514 U.S. at 558.

141. A venue, such as a restaurant, in which commerce takes place could easily be seen as an "instrumentality of commerce," as could a warehouse where trucks unload. But there seems to be general agreement that "instrumentalities" is limited to vehicles. See *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995).

142. 514 U.S. at 558-59.

143. 379 U.S. 294, 298 (1964).



ence to *United States v. Tropicano* above,<sup>144</sup> is well known. But the Hobbs Act also applies to extortion “under color of official right.”<sup>145</sup> This applies to extortionate threats by public officials (e.g., “If you don’t pay me off you’ll never do business in this county again.”), as well as the giving and acceptance of bribes.<sup>146</sup> Under the reasoning of the *Hickman* dissent, since extortion is no more a “commercial activity” than robbery, the Hobbs Act could not be used unless the government could prove that “an organized crime group committed various” extortions that themselves had a substantial effect on interstate commerce.<sup>147</sup> However, as argued above, this is an unduly restrictive reading of the *Lopez/Morrison/Jones* trilogy.

Even if the extremely narrow reasoning of *Hickman* is not employed, *Morrison* and *Jones* suggest that extortion must nevertheless be aimed at commercial activity—extortion, like robbery, of a private individual is not enough. This raises questions about the scope of “commercial activity.” In *United States v. Stillo*, a defense attorney paid off a judge to dismiss a series of criminal cases against his client.<sup>148</sup> The government tried the case under the standard “depletion of assets” approach—showing that the lawyer’s firm purchased supplies in interstate commerce and that money given in bribes was not available to make interstate purchases.<sup>149</sup> The Seventh Circuit affirmed, noting that *Lopez* was inapplicable because extortion is “economic activity” and the Hobbs Act includes the “affecting interstate commerce” language absent in the Gun Free Schools Zone statute.<sup>150</sup> More relevant, declared the court, was *Robertson*<sup>151</sup> (the gold mine case), where a RICO conviction was upheld because the gold mine purchased supplies from out of state.<sup>152</sup>

I disagree with the court’s reasoning, though not its result. First, as discussed, it is unlikely that extortion is the sort of commercial activity that the Supreme Court had in mind in *Lopez*. Second, the Hobbs Act is not automatically exempt from *Lopez* problems merely because of its “affecting commerce” language. Third, the “depletion of assets” approach is troubling because it, or related reasoning, like the government’s argument in *Lopez* and *Morrison*, can be applied to almost any

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144. See *supra* text accompanying note 92.

145. 18 U.S.C. § 1951(b)(2) (2000).

146. See *supra* text accompanying note 107.

147. *United States v. Hickman*, 179 F.3d 230, 236 (5th Cir. 1999) (Higginbotham, J., dissenting).

148. 57 F.3d 553, 555–56 (7th Cir. 1995).

149. *Id.* at 558.

150. *Id.* at 558 n.2.

151. *United States v. Robertson*, 514 U.S. 669, 671–72 (1995).

152. *Stillo*, 57 F.3d at 558 n.2.

crime.<sup>153</sup> Murder, for example, also interferes with the victim's ability to make purchases in interstate commerce. Also, just because the firm had made purchases in interstate commerce in the past does not prove beyond a reasonable doubt that the bribe money would have gone for an interstate purchase. In fact, the lawyer's bribes in *Stillo* no doubt had the net effect of *increasing* the firm's or the lawyer's assets—otherwise why would he give them? Thus “depletion of assets,” particularly in a bribery case, is a legal fiction.<sup>154</sup>

A more straightforward approach would be to concede that extortion or other crime against an individual which does not directly target his business assets is not covered by the Hobbs Act. But extortion in the course of, or aimed at, one's business—even if it is a business with a less direct connection to interstate commerce than the robberies in *Hickman*—is nevertheless “commerce” within the spirit of *Lopez* and *Morrison*. It satisfies the Hobbs Act because the aggregate effect of such extortionate activity would be deleterious to interstate commerce. Such aggregation is explicitly allowed by *Lopez*.<sup>155</sup> The criminal court system of the city of Chicago has at least as much connection to interstate commerce as does Ollie's Barbeque. A showing of depletion of assets in the individual case is thus not necessary.

In *Stillo*, if criminals were routinely allowed to go free by bribing judges, the nation's commerce, indeed its very structure, would be at risk. Business related bribes and extortion strike at the very heart of the nation's commerce. Moreover, since local authorities are, by definition, corrupt in these cases, it is particularly necessary for the federal government to have prosecutorial authority. Therefore, Mr. *Stillo* loses, not because the bribe depleted the assets of the lawyer's firm and not because this bribery had any direct effect on commerce, *de minimis* or otherwise, but because bribery of judges in the course of their business is “commercial activity” and does, in the aggregate, affect interstate commerce.

In sum, the government must prove the element “affecting interstate commerce” in every Hobbs Act case. After *Jones*, it is clear that robbery or extortion of a private individual for reasons unrelated to his business

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153. Also, occasionally a court will find that the government has failed to establish a sufficient nexus to commerce. *E.g.*, *United State v. Elders*, 569 F.2d 1020 (7th Cir. 1978).

154. It is easier to argue that, when a zoning commissioner demands \$5000 to rezone an area before a business can be built, he has depleted that business of assets that would be used to make purchases in commerce. Even here, although the consequence of refusing to make a payoff is inability to conduct business, the net effect of the bribe on commerce may be positive (though the Hobbs Act does not require a negative effect).

155. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (“[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”).

do not qualify for federal jurisdiction. The proper way to establish "affecting commerce" is not to show that the business that was the "victim" of the extortion or robbery made purchases in interstate commerce and that their ability to do so in the future would be impeded as a result of the crime. Rather, the government should simply show that robberies or extortions of businesses have, cumulatively, an adverse effect on interstate commerce, even if, as in *Wickard v. Filburn*, this business does not make any transactions in interstate commerce itself.

## B. WEAPONS OFFENSES

Because *Lopez* was a gun possession case, the status of other weapons offenses may be called into question. The lower courts, however, have had no difficulty with these cases because the statutes refer to interstate commerce whereas the Gun Free School Zone Act did not.<sup>156</sup> Thus, in a typical case, *United States v. Jones*,<sup>157</sup> the court dealt with 18 U.S.C. § 922(g) which makes it unlawful for convicted felons, narcotics addicts, illegal aliens, and other specified persons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any [specified] firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."<sup>158</sup> Since this statute "contains a jurisdictional element, explicitly requiring a nexus between the possession of firearms and interstate commerce,"<sup>159</sup> the court held that convictions under this statute, even for mere possession, raise no problems under *Lopez* or *Morrison*:

[Section] 922(g) can rationally be seen as regulating the interstate transportation of firearms and ammunition and so constitutes a valid exercise of Congress's power to regulate in the second of [the three *Lopez*] categories. It can also be seen as falling within the third category, which requires only a minimal nexus that the firearm in question have moved in interstate commerce at some time.<sup>160</sup>

The First Circuit has held that possession of a single bullet that had moved in commerce is sufficient.<sup>161</sup>

In the pre-*Lopez* case of *United States v. Scarborough*, the Supreme Court upheld a conviction like *Jones*'s, brushing aside the fact that the statute does not punish mere possession but rather possession "in or af-

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156. See *United States v. Jones*, 231 F.3d 508, 514 (9th Cir. 2000) ("Every Court of Appeals that has considered this issue has concluded that § 922(g)(8) is a valid exercise of Congress's power under the Commerce Clause.") (citing cases).

157. *Id.*

158. 18 U.S.C. § 922(g) (2000) (emphasis added).

159. *Jones*, 231 F.3d at 514.

160. *Id.* (citations omitted).

161. *United States v. Cardoza*, 129 F.3d 6, 11 (1st Cir. 1997).

fecting commerce.”<sup>162</sup> But possession of a gun, or a bullet, that, at some uncertain time in the past, was shipped interstate is hardly “in or affecting commerce.”

It is not surprising that the lower courts continue to rely on *Scarborough*,<sup>163</sup> but *Scarborough* was not reaffirmed in *Lopez* and, in my view, is now bad law.<sup>164</sup> Unlike robbing a business, possession of a gun, as *Lopez* noted, has no direct effect on commerce, and the indirect effect is very remote. Moreover, the statute by its terms does not prohibit merely possessing a gun that has moved in interstate commerce but proof that the gun is “in or affecting commerce.” Congress can certainly prohibit the shipment in commerce of guns to various people, and ordering of guns by them, but under the new *Lopez/Morrison/Jones* regime, these convictions for mere possession are defective on statutory grounds, without reaching the constitutional issue.<sup>165</sup> By contrast, possession of a weapon by such person on a bus, or with the intention to rob a store, would be possession “in or affecting commerce.”

A different problem is posed by the new § 922(q) which Congress reenacted after *Lopez*.<sup>166</sup> The statute now includes a finding that “firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools.”<sup>167</sup> Section 922(q)(2)(A) now makes it a crime to “knowingly possess a firearm that has moved in or otherwise affects interstate or foreign commerce at a place that the individual knows, or has reason to know, is a school zone.” Unlike § 922(g), this statute directly makes possession a crime with past movement in commerce sufficient to establish jurisdiction. However, just because a gun has passed in interstate commerce hardly satisfies *Lopez*’s “substantial effect” requirement. Also, as *Lopez* held, gun possession is

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162. 431 U.S. 563, 578 (1977).

163. Compare *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (expressing doubts about, but following, *Scarborough*), with *United States v. Luna*, 165 F.3d 316, 322 (5th Cir. 1999) (upholding a § 922(j) conviction as consistent with Congress’s power without relying on *Scarborough*).

164. Professors Brandon Denning and Glenn Reynolds agree that the view of the courts of appeals upholding this statute “cannot be correct.” Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1272 (2003).

165. But see Elizabeth Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, The Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 HARV. WOMEN’S L.J. 57, 132 (2002) (arguing that the gun statutes are still valid after *Morrison*). Professor Merritt takes a similar view. Merritt, *supra* note 114, at 717–20.

166. Pub. L. No. 104-208 § 657, 110 Stat. 3009-370 (1996). Congress also made findings about the effect of firearm possession in and around schools while *Lopez* was pending, but the Court did not consider these. *United States v. Lopez*, 514 U.S. 549, 563 n.4 (1995).

167. 18 U.S.C. § 922(q)(1)(C) (2000).

not a commercial activity that can be aggregated. For this reason, plus the fact that the Court could see this as Congress sticking its thumb in the Court's eye, this statute may, and should, also be struck down.<sup>168</sup> Mere passage in commerce at some prior date without the defendant's participation is hardly a "substantial effect" on commerce.<sup>169</sup>

Justice Department officials Harry Litman and Mark Greenberg, however, argued in 1997 that mere passage in commerce was enough, without the need to show a substantial effect:

[R]egardless of its purposes, Congress may, under the Commerce Clause, regulate threats to health or safety that are caused by interstate commerce. . . . Further, even were Commerce Clause doctrine to be reconceptualized to limit Congress to certain purposes, preventing interstate commerce from being a vehicle of injury to health and safety would be an entirely appropriate purpose.<sup>170</sup>

I agree up to a point. Just because something that is not inherently dangerous, though, such as film or handguns (which in Congress's view are not inherently dangerous) has at some point passed in interstate commerce is hardly a sufficient basis for federal jurisdiction. Congress can certainly regulate the shipping of guns by and to felons, illegal immigrants, etc. However, when it prohibits the possession of something that at one time passed in interstate commerce it has gone beyond its authority to regulate commerce and is instead engaged in crime fighting. But *Lopez* is clear: Congress is only entitled to fight crime that has a substantial effect on commerce. *Lopez* itself rejected essentially this argument as to handguns when it dismissed the government's "impact of guns on commerce argument" as to the original Gun Free Schools Zones Act.<sup>171</sup>

What then of more serious weapons like hand grenades<sup>172</sup> and machine guns? Section 922(o) declares that it is unlawful for a person "to transfer or possess a machinegun" without any reference to interstate

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168. *But see* *United States v. Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999) (upholding the new statute). If the Court strikes down convictions under this statute, convictions under § 922(j), which forbids possession of a stolen firearm that has moved in commerce, would also be defective. *But see* *United States v. Luna*, 165 F.3d 316, 325-26 (5th Cir. 1999) (upholding such a conviction).

169. *Contra* Brickey, *supra* note 21, at 832 (writing before *Jones* and *Morrison*, hypothesizing this statute prior to its passage and arguing that "possession of a gun ten years after it was shipped in interstate commerce can be reached under the Commerce Clause").

170. Harry Litman & Mark Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 926 (1997).

171. *See supra* text accompanying note 41.

172. The National Firearms Act, 26 U.S.C. § 5812(b) (2000), forbids possession of unregistered hand grenades. In *United States v. Freed*, the Supreme Court upheld a conviction under the statute despite the absence of an *scienter* requirement. 401 U.S. 601, 607-10 (1971). The statute does not refer to interstate commerce either, but that issue was not before the Court. The definition of "firearm" includes machine guns, sawed-off shotguns and various "destructive devices" including bombs and hand grenades. 26 U.S.C. § 5845.

commerce.<sup>173</sup> The courts of appeals nonetheless all agree that this statute survives a *Lopez* challenge.<sup>174</sup> The Second Circuit explained in *United States v. Franklyn*:

We distinguish *Lopez* on the ground that § 922(o), by contrast with § 922(q), is integral to a larger federal scheme for the regulation of trafficking in firearms—an economic activity with strong interstate effects. . . . [S]ection 922(o) fits into the overall regulation of the international and interstate market in weapons deemed particularly dangerous by Congress. Section 922(a) places restrictions on the international and interstate shipment of firearms generally. Section 922(b)(4) forbids the sale or delivery of machine guns by licensed importers, manufacturers, dealers, or collectors except as specifically authorized by the Secretary of Defense.<sup>175</sup>

Indeed, *Lopez* noted that § 922(q) (the Gun Free School Zones Act) “represents a sharp break with the longstanding pattern of federal firearms regulation,”<sup>176</sup> suggesting that the Court is probably prepared to accept Congress’s extensive regulation of certain particularly dangerous firearms, even though the link to interstate commerce in individual cases may be attenuated.

In *United States v. Rybar*, the Third Circuit concluded that

[c]ongressional findings generated throughout Congress’ history of firearms regulation link both the flow of firearms across state lines and their consequential indiscriminate availability with the resulting violent criminal acts that are beyond the effective control of the states.<sup>177</sup>

Dissenting Judge Alito objected to this since there have been no findings as to the effect of the *intrastate* possession of machine guns on commerce and such effect is not obvious.<sup>178</sup> The Second Circuit, however, agreed with the *Rybar* majority, holding that “Congress’s intent to regulate possession and transfer of machine guns as a means of stemming interstate gun trafficking is manifest.”<sup>179</sup>

This seems reasonable. The states are not in a good position to regulate the national and international trade in especially dangerous weapons like machine guns and hand grenades, and having a federal offense for possession of such weapons, even if it cannot, or need not, be proved that the weapons have moved in or affected interstate commerce, seems like a reasonable aspect of that regulatory authority. Congress, moreover, has

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173. 18 U.S.C. § 922(o) (2000).

174. PETER LOW, *FEDERAL CRIMINAL LAW* 161 (2d ed. 2003).

175. 157 F.3d 90, 94 (1998) (citations omitted).

176. 514 U.S. at 563 (citation omitted).

177. 103 F.3d 273, 279 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

178. *Id.* at 293 (Alito, J., dissenting).

179. *Franklyn*, 157 F.3d at 96 (quoting *Rybar*, 103 F.3d at 282).

made findings about the effects of these weapons on commerce. On the other hand, criminalizing possession of handguns, which are not highly regulated, and as to which state laws vary, does not seem like such a compelling federal interest or to have such an obvious effect on commerce,<sup>180</sup> though gun possession by felons and narcotics addicts certainly poses a more direct threat to commerce than does possession by someone in a school zone.

Admittedly, the above reasoning is not self-evident.<sup>181</sup> The more obvious order of vulnerability of the statutes is that convictions under § 922(o), with no reference to commerce, are the most vulnerable. Convictions under § 922(g), with a requirement of affecting commerce that is not being proved, are also likely to be reversed, whereas convictions under the new § 922(q), which forbids possession of a weapon that has traveled in interstate commerce, are the safest. I am predicting, however, that § 922(q) and § 922(g) convictions are more likely to be reversed, whereas § 922(o) convictions will likely be upheld. This is based on the language of *Morrison* suggesting that the mere presence of a jurisdictional hook in a statute is not dispositive, as well as the political consideration that the Court is more likely to support Congress's findings and general authority in the area of particularly dangerous weapons rather than handguns. That is, regulation of hand grenades and machine guns is a "truly national" concern.<sup>182</sup> Further, the Court may not accept Congress's attempt to "overrule" *Lopez*.

### C. CHILD PORNOGRAPHY

The Child Restoration and Penalties Act of 1990<sup>183</sup> is a statute that allows prosecution based on a very remote connection to commerce.<sup>184</sup> The statute prohibits possession of child pornography that has either been shipped in interstate commerce or "which was produced using materials which have been mailed or so shipped or transported by any means including computer."<sup>185</sup> Thus, using film that has traveled in interstate commerce to make child pornography is enough to qualify the defendant for prosecution. The Third Circuit considered the

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180. This is despite my personal view, developed as a prosecutor, that the sale of handguns to (and possession by) anyone should be seriously restricted.

181. Indeed, Professors Denning and Reynolds argue that while "a federal statute aimed at staunching any interstate traffic in machine guns could . . . be drafted," § 922(o) is defective under *Morrison*. Denning & Reynolds, *supra* note 164, at 1279. I think § 922(o) is good enough.

182. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

183. 18 U.S.C. § 2252 (2000).

184. This statute was changed in 1996 and portions of it were struck down on First Amendment grounds by the Supreme Court in *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002).

185. 18 U.S.C. § 2252(a)(4)(B).

constitutionality of a conviction under this statute in *United States v. Rodia*.<sup>186</sup>

While other courts have simply upheld this statute because it contains a reference to commerce,<sup>187</sup> the Third Circuit rightly concluded, as I argued above, that the mere presence of a jurisdictional hook in the statute could not be considered dispositive.<sup>188</sup> Rather, the courts should independently examine the crime in question and determine if it falls into one of the three *Lopez* categories: "In *Lopez* the Court did not simply state or imply that all criminal statutes must have such an element, or that all statutes with such an element would be constitutional . . . ."<sup>189</sup>

However, the court then went on to uphold the statute, albeit with reservations,<sup>190</sup> citing the machine gun cases:

By outlawing the purely intrastate possession of child pornography . . . Congress can curb the nationwide demand for these materials. We believe that such possession "through repetition elsewhere," helps to create and sustain a market for sexually explicit materials depicting minors.<sup>191</sup>

In other words, similarly to *Wickard*, Congress is trying to regulate an interstate market in a commodity which is presumably illegal in all the states but hard to regulate. Congress has rationally concluded that an effective means of doing so is to curb demand by, in this case, criminalizing possession of the commodity. This view is shared by the First,<sup>192</sup> Fifth,<sup>193</sup> Seventh,<sup>194</sup> and Eighth<sup>195</sup> Circuits.

This is a sound distinction from *Lopez* if the pornography is commercially produced (as machine guns are). While misuse of handguns certainly wreaks more havoc in society than possession of child pornography or machine guns, the mere possession of handguns is generally legal whereas the possession of machine guns and child pornography is not. Moreover, the latter two commodities are subject to a substantial, illegal, interstate traffic which is difficult for the states to stop. Accordingly, it is

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186. 194 F.3d 465 (3d Cir. 1999).

187. See, e.g., *United States v. Bausch*, 140 F.3d 739, 741 (8th Cir. 1998) (citing cases), *cert. denied*, 525 U.S. 1072 (1999).

188. *Rodia*, 194 F.3d at 472-73.

189. *Id.* at 473. (quoting Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 112 (1998)).

190. *Id.* at 468 ("Although we are not without misgivings given the breadth of the regulation at issue . . .").

191. *Id.* at 476 (quoting *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995))).

192. *United States v. Robinson*, 137 F.3d 652 (1st Cir. 1998).

193. *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000).

194. *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000).

195. *United States v. Bausch*, 140 F.3d 749 (8th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999).



within the power of Congress, in trying to limit such possession generally, to forbid purely intrastate possession, regardless of whether a jurisdictional element appears in the statute or is proved in the individual case.

However, it appears that the child pornography in *Rodia* was not commercially produced.<sup>196</sup> Possession by an individual of pornography that he produced himself and did not intend for commercial use does not fall within the federal ambit any more than marijuana possession<sup>197</sup> or arson of a private home. This is what the Ninth Circuit held in *United States v. McCoy*.<sup>198</sup> In *McCoy*, a mother was prosecuted for a single family picture in which the genital area of herself and her ten-year-old daughter was exposed.<sup>199</sup> This photo was apparently the result of alcohol induced indiscretion on the part of the parents (the stepfather took the picture) rather than any prurient intent.<sup>200</sup> Federal jurisdiction was based on the fact that the camera and film had been produced out of state.<sup>201</sup>

The Ninth Circuit distinguished *Wickard* on the ground that the private production in this case was not connected to any interstate "market."<sup>202</sup> Unlike *Wickard*'s wheat, home production of this picture did not mean that the defendant then bought less pornography interstate, since there was no indication that the defendant had ever bought or intended to buy, pornography at all.<sup>203</sup> Considering *Morrison*'s four criteria for "substantial effect on commerce," the court in *McCoy* concluded that there was none.<sup>204</sup> The Sixth Circuit similarly struck down a conviction based on personal photographs where the only link to interstate commerce was the out-of-state production of the paper on which the photos were printed.<sup>205</sup>

If the Supreme Court is serious about federalism principles, it should agree with the Ninth Circuit. Clearly the effect on interstate commerce of possession of privately produced and used child pornography, based

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196. 194 F.3d at 469 ("The material creating the purported jurisdictional hook in this case was the Polaroid film with which Rodia's pictures were taken. It is undisputed that Polaroid film has never been manufactured in New Jersey . . ."). The court later refers to the pornography as "home grown." *Id.* at 477.

197. See *infra* text accompanying notes 215-17.

198. 323 F.3d 1114 (9th Cir. 2003). The court in *McCoy* specifically likened the case to possession of a single marijuana cigarette. *Id.* at 1122.

199. *Id.* at 1115.

200. *Id.* at 1134 (Trott, J., dissenting).

201. *Id.* at 1126.

202. *Id.* at 1122.

203. *Id.* If the defendant was found in possession of other, out-of-state pornography, it would have strengthened the government's *Wickard* argument, but since he could in any case be prosecuted for the out-of-state pornography, it would not matter.

204. *Id.* at 1133.

205. *United States v. Corp.*, 236 F.3d 325, 326, 332-33 (6th Cir. 2001).

solely on the fact that the film or camera had traveled in interstate commerce, is too attenuated to form a basis for federal jurisdiction after *Morrison*. The attempts to distinguish this crime, which conservatives obviously want to prosecute, offered in the courts of appeals are unconvincing.<sup>206</sup> The best argument for federal jurisdiction is that, as discussed above, Congress can prohibit possession of child pornography generally and is not required to distinguish between that which is privately and that which is commercially produced, since it all tends to harm the child involved and at least has the potential to contribute to the national market.<sup>207</sup> However, as *Jones* makes clear, the activity in *each case* must be "commercial" in nature.<sup>208</sup> The defendant's acts in *McCoy*, conceded even by the dissent to be "non-commercial," simply do not qualify.<sup>209</sup>

#### D. RICO

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a), forbids using the proceeds of racketeering activity to acquire an enterprise "engaged in or the activities of which affect interstate or foreign commerce." Section 1962(b) forbids the use of racketeering activities to acquire such an enterprise, and § 1962(c) forbids "conduct[ing] or participat[ing] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." *Robertson* was a prosecution under § 1962(a) where the defendant used the proceeds of narcotics offenses to buy a gold mine. Since the gold mine was engaged in commerce, the Court had no difficulty upholding the conviction. In *United State v. Riddle*, the Sixth Circuit affirmed a RICO conviction under § 1962(c) involving an intrastate gambling operation which engaged in various interstate transactions to further the affairs of the business.<sup>210</sup> A *de minimis* effect on commerce was found sufficient.<sup>211</sup> In

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206. See, e.g., *United States v. Rodia*, 194 F.3d 465, 477-78 (3d Cir. 1999) (advancing the theory that possession of "home grown" pornography may create an "addiction" that will lead the possessor into the interstate market, though Congress made no such finding). But see *McCoy*, 323 F.3d at 1121 (dismissing this theory).

207. This is similar to the argument that Judge Trott made in his dissenting opinion in *McCoy*. 323 F.3d at 1133 (Trott, J., dissenting).

208. *Jones v. United States*, 529 U.S. 848, 854 (2000).

209. *McCoy*, 323 F.3d at 1134 (Trott, J., dissenting). Judge Trott argues that since the statute itself is a legitimate exercise of federal power, it does not matter that individual defendants are prosecuted for non-commercial activities. See *id.* at 1134-35 ("[T]he *de minimis* nature of individual instances arising under this statute is of no consequence." (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995))). The Supreme Court's point, however, was that a "substantial" effect on commerce need not be shown, not that the activity in question could be totally non-commercial.

210. 249 F.3d 529, 537 (6th Cir.), cert. denied, 534 U.S. 930 (2001).

211. *Id.*

*United States v. Juvenile Male*, the Ninth Circuit upheld a RICO conviction involving a series of Hobbs Act robberies by a juvenile gang.<sup>212</sup>

RICO presents a double opportunity for the government to establish jurisdiction since it will suffice if the enterprise either directly, as in *Robertson and Riddle*, or indirectly through the pattern crimes, as in *Juvenile Male*, affects commerce. Thus, while extortion or robbery of a private individual and arson of a private home no longer qualify for federal jurisdiction, if any of these activities are undertaken by an enterprise that independently affects commerce, such as an organized gang, then federal jurisdiction will lie, using *state law* arson, robbery, or extortion statutes as the "pattern of racketeering activity." Alternatively, a series of private robberies or arsons by such a gang could itself have a substantial effect on commerce, and the relevant federal statutes could be used as the pattern crimes. This is a particularly gratifying result since it allows the courts to trim federal jurisdiction as to crimes by individuals but still gives the federal government the ability to prosecute such crimes when perpetrated by commerce-affecting enterprises such as organized crime.

#### E. NARCOTICS OFFENSES

Title 21, section 841(a)(1) makes it a crime "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ." Interstate commerce is not mentioned, but in § 801, Congress found that:

(2) The illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate or foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow . . . nonetheless have a substantial and direct effect upon commerce . . .

In general, narcotics offenses are commercial activities and therefore pose no *Lopez* problems, which *Robertson* made clear.<sup>213</sup> The Court is undoubtedly prepared to accept Congress's findings as to the effect of the narcotics trade on interstate commerce and not require that it be proved in an individual case.

By contrast, "manufacture" of marijuana for personal use is arguably not itself a commercial activity. But the courts have had no difficulty holding, as in *Wickard v. Filburn*, that personal production of this agri-

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212. 118 F.3d 1344, 1348 (9th Cir. 1997). See also *United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997) (involving a narcotics distribution operation).

213. See also *United States v. Pompey*, 264 F.3d 1176, 1180 (10th Cir. 2001).

cultural commodity affects the interstate market<sup>214</sup> by reducing demand for a commercially produced product. However, § 844 also prohibits simple possession of controlled substances. Since possession of small amounts of drugs is certainly not “commercial activity,” and consequently cannot be aggregated, unlike growing wheat in *Wickard*, the Court should strike down § 844 at least as to marijuana and other drugs that may have been produced locally.<sup>215</sup> It could be argued that, as with machine guns, narcotics, including marijuana, have long been subject to federal regulation and are, in Congress’s view, dangerous substances. However, to argue that marijuana specifically is more dangerous than handguns and as dangerous as machine guns is ridiculous in light of studies showing it not to be especially dangerous at all.<sup>216</sup> Moreover, six states have authorized marijuana for medical use, and Canada has legalized its possession.<sup>217</sup> I do not, however, predict such a ruling from the Supreme Court.

#### F. CARJACKING

The federal carjacking statute punishes anyone who “with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation . . . .”<sup>218</sup>

Since carjacking is a more commercially oriented activity than possession of a gun, the courts of appeals have unanimously upheld convictions under this statute simply because the car has at some point been shipped in interstate commerce.<sup>219</sup> This misses the point of *Lopez*. Assuming the carjackings are of private individuals, the reasoning above concerning the Hobbs Act would apply equally here. As I read *Lopez*

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214. *E.g.*, *Proyect v. United States*, 101 F.3d 11, 13–14 (2d Cir. 1996); *United States v. Leshuk*, 65 F.3d 1105, 1111–12 (4th Cir. 1995).

215. *See United States v. McCoy*, 323 F.3d 1114, 1122 (9th Cir. 2003) (dictum). *Cf. United States v. Peterson*, 236 F.3d 848, 855–57 (7th Cir. 2001) (reversing a Hobbs Act conviction for robbery of a marijuana seller on the ground that the government had not established that the victim’s marijuana business affected interstate commerce, but distinguishing the drug control statutes based on congressional findings.).

216. *See generally* Californians for Compassionate Use, *Medical Research and Reports*, at <http://www.marijuana.org/ResearchPage.html> (last visited Jan. 24, 2004) (a pro-marijuana website). Admittedly, there are other studies finding marijuana to be dangerous in various ways but generally not more so than alcohol. *But see* National Youth Anti-Drug Media Campaign, at [http://www.freevibe.com/Drug\\_Facts/mj.asp](http://www.freevibe.com/Drug_Facts/mj.asp) (last visited Jan. 24, 2004) (an anti-marijuana website).

217. Californians for Compassionate Use, *Medical Research and Reports*, at <http://www.marijuana.org/ResearchPage.html>.

218. 18 U.S.C. § 2119 (2000).

219. *See United States v. Cobb*, 144 F.3d 319, 320–21 (4th Cir. 1998) (citing cases from seven circuits).

and *Morrison*, few crimes are “commercial activity” per se.<sup>220</sup> Consequently, aggregation of the effects of many carjackings is not permitted. Plus, the mere fact that the car has passed in interstate commerce at some point is too attenuated to have a substantial effect on commerce under the *Morrison* criteria. Instead, either the victim or the criminal enterprise must be engaged in commerce. (Thus, a ring of carjackers who robbed cars from private individuals and then sold them interstate would violate RICO because of the nature of their enterprise, not because the cars had at some prior time moved in commerce.) The lower federal courts, on the one hand complaining bitterly about Congress’s overburdening them with criminal matters, have again declined an invitation by the Supreme Court to narrow their jurisdiction.<sup>221</sup>

In *United States v. Bishop*, the Third Circuit argued that cars are “instrumentalities of interstate commerce” and, as such, qualify under the second *Lopez* category even if their theft cannot be said to “affect commerce” under the third.<sup>222</sup> This expands the “instrumentality” concept too far. Unlike a train or a semi-trailer truck, a car is generally not an instrumentality of interstate commerce. Therefore, to qualify under *Lopez*’s second category, the government would have to prove in the individual case that a car was in fact being used as an instrumentality of commerce for federal jurisdiction to lie. Alternatively, under *Jones*, use of the car for local pizza deliveries, even by a non-chain local store, would suffice since, once “commerce” is involved, a connection to *interstate* commerce is inevitable and need not be proved by the facts of the individual case,<sup>223</sup> or aggregation could be employed.

There is another argument that has been used by some courts that is a more convincing defense of the carjacking statute. In *United States v. Cortes*, the Ninth Circuit did not rely on the car’s previous passage in interstate commerce or claim it was an “instrumentality” of commerce.<sup>224</sup> Rather, it pointed to congressional findings that cars stolen intrastate are disassembled in professional “chop shops” where the parts are then sold

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220. The exceptions may be crimes like receipt of stolen property, loansharking, and securities fraud, which mimic ordinary commercial transactions. These crimes likely affect commerce anyway, though.

221. But see Drew Blatt, Casenote, *The Federal Carjacking Statute Under Commercial Clause Scrutiny After Lopez*: *United States v. Mchenry*, 97 F.3d 125 (6th Cir. 1996), 66 U. CIN. L. REV. 747, 771 (1998) (arguing that the carjacking statute survives constitutional scrutiny because carjacking affects interstate commerce).

222. 66 F.3d 569, 588 (3d Cir. 1995). But see *id.* at 597 (Becker, J., dissenting).

223. That is, the government could offer boilerplate expert opinion that any business affects interstate commerce or, as would usually be the case, get a stipulation to this effect.

224. 299 F.3d 1030, 1035–36 (9th Cir. 2002).

in interstate and foreign commerce.<sup>225</sup> Still, the government should have to show some intent by the defendant to do such a thing, rather than just use the car for his own purposes, before federal jurisdiction could be established.

#### G. FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT ("FACE")

Another statute that has been the subject of many unsuccessful appeals is FACE. This statute provides criminal and civil penalties against anyone who "injures, intimidates or interferes" with anyone "from obtaining or providing reproductive health services."<sup>226</sup> Again the courts of appeals have been unanimous in upholding FACE against *Morrison* and *Lopez* challenges, though there have been some strong dissents.<sup>227</sup> The courts are clearly correct. Under the Hobbs Act analysis above, since abortion clinics are commercial enterprises, interfering with them is a legitimate concern of Congress. The fact that the statute does not contain jurisdictional language is irrelevant since every commercial enterprise "affects interstate commerce" and the individual effects can be aggregated. It is likewise insignificant that the defendant's acts of "injuring, intimidating or interfering" are not "commercial," as the dissenting judges have argued.<sup>228</sup> Robbery is also not commercial, but robbery of a commercial enterprise is a Hobbs Act violation.

#### H. SUMMARY OF PRINCIPLES

The following principles can be distilled from the discussion of the statutes and cases above. First, federal jurisdiction under the Commerce Clause is limited to commercial activity plus regulation of the channels and instrumentalities of commerce. Crimes aimed at private individuals, homes or cars, as well as statutes criminalizing the behavior of individuals are no longer constitutional unless a direct and substantial impact on

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225. *Id.*

226. 18 U.S.C. § 248(a)(1) (2000).

227. *See, e.g.,* United States v. Gregg, 226 F.3d 253, 261 (3d Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) (citing cases). *But see id.* at 268 (Weis, J., dissenting). The majority had this response to the dissent:

The dissent characterizes the connection between clinic blockades and interstate commerce as the same attenuated "but-for-causal-chain" . . . rejected by the Court in *Morrison*. This view narrowly focuses on the activity regulated by FACE in the abstract and fails to acknowledge the national market for reproductive health services in the country. Congress determined that the abortion provider shortage in the United States has resulted in a national market for abortion services. In this context, abortion related violence committed to close down a reproductive health clinic . . . has a direct effect on interstate commerce.

*Id.* at 266 n.4. This provides an additional reason beyond the more fundamental analysis offered in the text.

228. *See NOW I*, 510 U.S. 249, 260 (1994) (holding that politically, rather than economically, motivated extortion directed at abortion clinics violates the Hobbs Act).

commerce can be shown in the individual case. Crimes aimed at commercial activity, by contrast, can be aggregated to show a substantial effect on commerce. Thus, robbery of a pizza deliveryman while he is on duty violates the Hobbs Act. Robbery of him off-duty does not.<sup>229</sup>

Second, economically motivated crimes such as robbery, extortion, and carjacking are not "commercial activity." For those crimes to be prosecuted by the federal government, they must be aimed at commercial activity. That term, however, includes the business activities of lawyers, doctors, public officials, etc. In other words, "commerce" is not limited to buying and selling. It is unclear whether some business crimes, like loansharking or securities fraud, are themselves "commerce," but it does not matter since they invariably affect commerce.

Third, it is neither necessary nor dispositive for the statute to contain jurisdictional language or a congressional finding of an effect on commerce, though these are helpful. The courts must make their own decisions on the "substantial effects" issue in each case.

Fourth, the mere fact that something may once have moved in interstate commerce, without the connivance of the defendant, is not enough to establish federal jurisdiction. Shipment, ordering, and receipt of objects in commerce, however, are subject to federal jurisdiction, as is traveling interstate to commit a crime.

Fifth, the Supreme Court is likely to accept longstanding congressional regulation of narcotics and certain dangerous weapons, even if a direct effect on commerce in a particular statute has not been shown, because of congressional findings that these crimes generally have a deleterious effect on commerce. However, mere possession of handguns, privately produced marijuana, and privately produced child pornography is too remote from commerce to justify continued federal jurisdiction. I do not expect the Supreme Court to adopt this position as to marijuana and child pornography. All of the other points, by contrast, express my sense of the thrust of the Supreme Court's opinions and where the Court is likely to go in the future.

### CONCLUSION

This Article concludes that the *Lopez/Morrison/Jones* trilogy suggests that the Court is in the process of making a meaningful, but not dramatic or disastrous, trimming of federal jurisdiction under the Com-

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229. A question arises as to what the defendant's *mens rea* must be as to the "commerce" element. In *United States v. Feola*, 420 U.S. 671, 683-84 (1975), the Supreme Court made it clear that strict liability could be applied to such a jurisdictional element absent congressional intent to the contrary. Of course, the issue of robbery of an off-duty delivery boy while he still has the proceeds of his night's work will pose a problem. (I say that it affects commerce since the money belongs to the business.)

merce Clause. It argues that two types of statutes will be narrowed: those that contain a jurisdictional “hook” but where the activity in question does not in fact substantially affect commerce and those where the victim is private property or a private individual—crimes which cannot be aggregated with other crimes to show a substantial effect on commerce. Moreover, the Court will also construe more statutes narrowly to ensure that prosecutors do not exceed the express terms of the statute. If this is the extent of the Court’s incursion into federal criminal law, federal prosecutors can live with it and federal criminal law will benefit from more precise drafting and careful reading of the laws.

More generally, the limitation of federal Commerce Clause jurisdiction to matters that actually do relate to commerce in a meaningful way seems reasonable. The Gun Free School Zones Act neither contained any jurisdictional element nor was based on findings that guns in school zones meaningfully affect interstate commerce. Much more problematic is when Congress has satisfied itself that a certain activity affects commerce and there is a “rational basis”<sup>230</sup> for that conclusion, as was the case with the Violence Against Women Act. Now the Court is not merely holding Congress within its constitutional authority but is substituting its own judgment for that of the legislative branch.<sup>231</sup> Just as there is no limit to Congress’s authority if the Court does not require a meaningful connection to commerce for Commerce Clause-based legislation, so there is no limit to the Court’s authority if it can strike down legislation for which Congress had a rational basis for finding such a connection.

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230. *Lopez* held that this is the appropriate test. 514 U.S. at 557.

231. For an insightful discussion of when the Court should defer to other branches’ views of constitutionality, see Dawn Johnsen, *Functional Departmentalism and Non-judicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. (forthcoming 2004).



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